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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, *Petitioner*,

v.

United States of America, *ex rel.*
JOHN LEE FEATHER, *Respondent*,

United States of America, *ex rel.*
LAVERNE BLACK THUNDER, *Respondent*,

United States of America, *ex rel.*
AMBROSE ST. JOHN, *Respondent*,

United States of America, *ex rel.*
JAMES R. KEEBLE, *Respondent*,

United States of America, *ex rel.*
CURTIS SMALL, *Respondent*,

United States of America, *ex rel.*
ROMAN V. DERBY, *Respondent*,

United States of America, *ex rel.*
JOSEPH DAY, *Respondent*,

United States of America, *ex rel.*
ARNOLD LAFROMBOISE, *Respondent*,

United States of America, *ex rel.*
CLARENCE WALKER, *Respondent*,

United States of America, *ex rel.*
THEODORE DUANE WYNDE, *Respondent*.

continued

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether or not the Federal Government and the Tribe have jurisdiction on criminal matters within the Sisseton-Wahpeton Indian Reservation that is also known as the Lake Traverse Reservation, as against the State having jurisdiction.

SUMMARY OF ARGUMENT

From the last Treaty with the Indians on the Lake Traverse Reservation of 1867, which established this Reservation as a permanent reservation and created this reservation as Indian country under the protection of the United States and the Indian Tribe, Congressional Enactment thereafter, including the Enactment of our present Code Sections 18 U.S.C.A. 1151 and 1153, as well as the Enactment of the Act of August 15, 1953, and the one of April 11, 1968, wherein Congress established the formula for the state to assume jurisdiction over the Indians, which the State of South Dakota has never seen fit to accept, and the cases not only before this Supreme Court such as Seymour and Mattz of the most recent ones but starting with *Worcester v. George*, have kept the jurisdiction of the Indians under the United States of America and even in the opening of this land for homesteading by the President's Proclamation used the words within the reservation.

ARGUMENT

We realize that we are not following the Appellant's Question Presented for we feel that he is only limiting this to one little part and that is not the law involved, and we think that the question is much broader really—who has criminal jurisdiction.

It appears that one place that all of us can start in this matter is the Treaty of 1867 which is found in Respondents' Appendix No. 1, and this is seemingly the last foundation item that all of us are in agreement on. Shortly after this Treaty with the Sisseton-Wahpeton Indians, and by the Act of May 3, 1871, which is found in 16 Stat. 566, and is now in our 25 U.S.C.A. 71, that we wouldn't make treaties with Indians any longer but we still make agreements with them. However, this states:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty but no obligation of any treaty lawfully made and ratified with any Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

There have been some cases and possibly here some disagreements trying to interpret an agreement that was made with the Sisseton-Wahpeton Band of Dakota or Sioux Indians, that is Appendix No. 2 in total, and we would like to call attention to the Court that the Indians did by this instrument "cede, sell, relinquish and convey to the United States" certain land within this reservation. It is also pertinent to note that a certain part of this reservation was set aside for the Indians and that the money derived from the sale of this land for home-

steading and townsites would be held in trust by the United States for the Indians.

They also were trying to adjust some prior inequities that seemingly had existed for a number of years inasmuch as this band of Indians had not been in the '62 uprising but had remained loyal and fought for the United States of America so they were paying them some more money besides the amount that was put in trust from the land that was purchased, and that part of this land was to be opened for settlers as is more fully set forth in the Act of Congress, 26 Stat. 1035, which is Respondents' Appendix No. 2 and it states:

> "after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fifty cents per acre, shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof,"

so this money was held in trust for the Indians on this Reservation.

It is also notable in this under Section 30 that this land

> "be subject only to entry and settlement under the homestead and townsite laws of the United States, except the 16th and 36th Section of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located."

We think that it is very pertinent to note that this land was not to be used except for homesteading and townsite purposes and to try and get people to try and help the Indians by them observing other farmers and seeing how these Indians could be helped in getting them self sufficient, which was a very commendable approach and was one with which the Federal Government was and has been attempting for some time.

In fact, in Section 26 of this, in ratifying this 1889 Agreement in 1891, Congress even stated:

> "All the allocated lands *within* the limits of the Reservation" (emphasis added)

It is also pertinent at this point to note that as is specified in Section 30 of this 1891 Act supra, that Sections 16 and 36 were only reserved for common school purposes and the words "subject to the laws of this state" added thereafter to this does not necessarily say that they are subject to the jurisdiction of the State. *United States v. Thomas*, 151 U.S. 577 on page 585, an 1894 case, supports this construction wherein in that case the Court recognized the obligation of the United States as guardian to protect the Indian wards and held that the Federal Court would have jurisdiction over crimes committed by Indians on the Section 36 within the Reservation, but that these sections had been ceded to the State for school purposes.

Several other agreements have had this same treatment except that no comma was placed before the word "and".

> Act of May 3, 1891, 26 Stat. 1039, Crow Reservation

Act of May 29, 1908, 35 Stat. 460, Cheyenne Reservation
Act of March 27, 1904, 33 Stat. 319, Devils Lake
Act of August 15, 1894, 28 Stat. 314
Act of June 6, 1900, 31 Stat. 672

The last several lines of the above quotation of Section 30, and one that has given our South Dakota Supreme Court a great deal of trouble, and perhaps it is one of the reasons that we have to be here today, *DeMarrias v. State*, 91 N.W.2d 480, South Dakota 1958, and *DeMarrias v. State*, 107 N.W.2d 255, South Dakota 1961, as it has been interpreted and we think wrongly so, and the Circuit Court of Appeals in the original case that we have here, *Feather v. Erickson*, 489 F.2d 99, stated that this being subject to the jurisdiction of the state wherein located did not apply to all of the land, but only at the most to Sections 16 and 36.

We think there have been some other things that have come down through the times in the form of showing Congressional intent that definitely establish that it was not the intention or the meaning of this at any time to have this as applying to all of the reservation. In fact the State of South Dakota does not even think that it applies to all of the reservation but they have admitted that the tracts of land within the reservation that were allotted to the respective individual Indians, and in this case it was not allotted to the tribes especially but to individual Indians, is still subject to Federal jurisdiction. We, on the other hand, maintain that all of it is subject to Federal jurisdiction and brings us up to the definition of Indian country as is set out in full in Appendix No. 3.

Also set out in this Appendix is the historical and reviser's notes as they appear in 18 U.S.C.A. 1151, but we feel that it is important here that we go ahead and

discuss this for in defining Indian country at least for the purposes of Federal jurisdiction and Indian Tribal Court jurisdiction, and definitely setting forth that the State does not have jurisdiction, states that:

> "the term, 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation".

We agree whole heartedly with the way that this was discussed and set out in an earlier case of this Court, *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The Seymour case supra, and our case have a great deal in common as both of them were opened up for settlement under the homestead laws on the surplus lands within the Reservation after the Government had purchased this and was holding the money in trust, and nowhere in either instance is there any language expressing vacating the reservation and restoring the land to public domain.

As is expressed in *United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 93, 54 L. Ed. 195,

> "Once Congress has established a reservation it remains so until separated therefrom by Congress."

In the case before this Court we can find no place where Congress has separated any of the reservation and therefore it is still all Indian country, #1151.

In fact, our South Dakota Supreme Court in *State of South Dakota v. Molash*, 199 N.W.2d 591, which took place on another reservation within the State of South Dakota, but being on a plateau with the case at bar, and upon deeded land but within the Standing Rock Indian Reservation, stated:

"The term 'Indian country' has been defined by Congress as 'all land within the limits of any Indian reservation under the jurisdiction of the United States notwithstanding the issuance of any patent'. Act of June 25, 1948, 62 Stat. #1151, Page 757, 18 U.S.C.A. 1151, as amended. It is established that state jurisdiction does not extend to Indians in Indian country, *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L. Ed.2d 251, and in *Smith v. Temple*, 82 S.D. 650, 152 N.W.2d 547, and cases cited therein, we recognized the following rules and principles:

'1. The disclaimer of jurisdiction contained in our Enabling Act and Constitution deprives our state of criminal jurisdiction over Indians and Indian territory;

'2. Public Law 280 (Chapter 505, 62 Stat. 588) is not a present grant of jurisdiction and this state has not effectively, affirmatively, and unequivocally acted to assume jurisdiction in the manner specified in such Act,' (Chapter 467 of the Laws of 1963 was a statutory effort by the state to comply with Public Law 280 which was referred to and rejected by the electorate of the State of South Dakota in 1964) therefore,

'3. Criminal jurisdiction over Indians for crimes committed within Indian territory in South Dakota is exclusively vested in the Federal and Tribal Courts.' "

So our Supreme Court agrees with this same theory as is expressed in Seymour supra, and also we find this very well expressed in *Condon v. Erickson*, 478 F.2d. 684 (8th Circ. 1973). Admittedly both Molash supra and Condon supra were on different reservations, Molash being on the Standing Rock Reservation and Condon on the Cheyenne Reservation; however, both of them were in the State of

South Dakota, and the cases involved here are for the Sisseton-Wahpeton Reservation.

In both of these cases they come back to Seymour supra which seems to be one of the main cases that our recent case law has been coming back to and should be considered by all of us very thoroughly, and they state this, I think better than I have the ability to do, and perhaps in a more forceful manner, as follows:

"(4) Counsel for the State of Washington present two alternative contentions which, if sound, would sustain the jurisdiction of the State over the land here in question even if the Act of 1906 did not completely dissolve the reservation in the manner held by the Washington courts. The first of these rests upon the assertion that the particular parcel of land upon which this burglary was committed is held under a patent in fee by a non-Indian. The contention is that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians. This contention is not entirely implausible on its face and, indeed, at one time had the support of distinguished commentators on Indian law. *But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in #1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent* * * *'*

'(5) The State urges that we interpret the words 'notwithstanding the issuance of any patent' to mean only notwithstanding the issuance of any patent to an Indian. But the State does not suggest,

nor can we find, any adequate justification for such an interpretation. Quite the contrary, it seems to us that the strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. *Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of #1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid."* (Emphasis added)

It should be noted at this time that as one of the conditions to South Dakota becoming a state they adopted Article XXII, which is Appendix No. 4, and before this Agreement that was ratified in 1891 by the United States Congress, 26 Stat. 1035, which is Appendix No. 2, that all lands lying within said limits owned or held by any Indian or Indian tribes and that the title thereto shall not have been extinguished by the United States, the same shall remain subject to the disposition of the United States and that the Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. Here again, Congress has not seen fit to terminate this control over their Indians on these Indian Reservations and Indian lands.

It is also very pertinent that in 1901 the State of South Dakota also relinquished to the United States exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons in violation of Federal laws when committed upon any reservation, and by an Act of February 2, 1903, 32 S.Ct. 793, Congress granted jurisdiction to the United States District Court for the State of South Dakota to hear and try all persons committing crimes on Indian Reservations.

This 1903 Act of the Government, of course, shows intention to assume all this jurisdiction. They already had it as it had never been relinquished according to our research but even if they had, they got it all back, and the State of South Dakota in their 1901 Act did relinquish all their jurisdiction regardless what it was prior to that time.

The State of South Dakota did not see fit that this jurisdictional question was a two-way street, but as is shown by Appendix No. 5, giving all of the Statutes as they have become to develop, it starts to erode and the State tried to assume partial jurisdiction as is set out in 34.0502 really on a concurrent jurisdiction. However, coming to 23-9-4 and 23-9-9 that is not as enlightened as it might be but inasmuch as the Federal Government has not relinquished any jurisdiction since 1903, we believe that this is entirely immaterial and it does make a whole lot stronger case than was set forth in the Seymour case, and it also shows an intent upon the Federal Government to assume exclusive jurisdiction over this Indian country and on all property within the reservation, and also excluding from State jurisdiction by the State, any jurisdiction.

Right after the turn of the century, therefore, the State and Federal Government seemingly were in agreement that the State would assume no jurisdiction and the

Federal Government would assume all jurisdiction. However, the State has tried to erode this and perhaps is the reason that we are now before this Court.

It is our contention, however, that even if the State wants to change this as the enactments of these various Statutes would indicate, the Federal Government has not gone along with it and, therefore, it is of no force and effect as far as we are concerned here.

In this same element of intent there is another part that we feel cannot be overlooked and as is set forth in 18 U.S.C.A. 3242, "Indians committing certain offenses; acts on reservations", and its history and reviser's notes as set forth in Appendix No. 6. By the reviser's notes he states:

> "1949 Amendment. Act May 24, 1949, substituted 'within the Indian country' for 'within any Indian reservation, including rights-of-way running through the reservation,' "

Also these reviser's notes state:

> "Section 549 of said title 18, relating to crimes in Indian reservations in South Dakota, was omitted as covered by section 1153 of this title. Accordingly the last sentence of said section 548, extending this section to prosecutions of Indians in South Dakota, was also omitted as unnecessary because this section is sufficient and applicable. Other provisions of said section 548 are incorporated in sections 1151 and 1153 of this title."

So again in 1949 we definitely find the intent of Congress in amendments of these parts and of the reviser's notes.

The President's Proclamation of April 11, 1892, 27 Stat. 1071, in Appendix No. 7, also states very definitely the intention of at least the Executive Branch of the Government as under No. 1 and No. 2, he states:

> "All that portion of the Lake Traverse Reservation . . . "

Also he states in this Proclamation:

> "The lands to be opened for settlement and for greater convenience, particularly described in the accompanying schedule entitled schedule of lands *within* the Lake Traverse Reservation open to settlement by Proclamation of the President dated April 11, 1892." (Emphasis added)

In connection with this Proclamation, the President at that time warned that until the official opening of this Reservation no entry was to be made upon the Reservation lands except by the Indians, and if the lands had been excluded from the Reservation, the Indians wouldn't have any more right on there than others would have, and he would not have made such a warning.

It is also of more than passing interest that there were rulings by the Executive Branch of our Government on two instances concerning the homesteading or the seeking of homesteads by non-Indians upon the opening of these lands under the 1891 Act.

In the Matter of Madella O. Wilson it was decided on August 10, 1893, by the First Assistant Secretary of the Interior wherein he states:

> "in the Sisseton-Wahpeton Indian Reservation"
> 17 L.D. 153

and also we have the Edward Parant matter decided on January 21, 1895, by the Secretary of Interior himself, stating that Parant was not:

> "disqualified to take a homestead *in the Lake Traverse Reservation*" (emphasis added)
> 20 L.D. 53

and also the Indian Agent at Sisseton in his annual report

of 1895 wherein he was describing the Lake Traverse Reservation comprising 918, 780 acres of land, and this is the same number of acres, to-wit: 918,780 acres, that is set forth in the 1867 Treaty supra.

And in 1900 the Indian Agent at Sisseton describes an undiminished Reservation when he states:

> "The Reservation is in the northeast part of South Dakota, occupying part of Roberts, Day, Grant, Marshall and Codington Counties and extending into Richland and Sargent Counties of North Dakota. It is about 120 miles long and at the state line 42 miles wide, coming to a point near Watertown, South Dakota . . . and there are 1970 allocated pieces of land situated from one end of the reservation to the other."
>
> Annual Report Commissioner of Indian Affairs
> United States Indian Affairs Office 385

So we have some very definite things here that we can rely on; that is, that the last treaty that was made with this band of Indians in 1867, the Federal Government has jurisdiction and this would be considered Indian country. The State of South Dakota said all of this by their Articles of the Constitution in 1889. We feel that the agreement with the Indians after treaties could no longer be made certainly did not by any stretch of the imagination diminish the reservation, and that it was a continuation of their policy of opening part of this reservation for homesteading, which does not reduce the reservation, Seymour supra, and the Executive Branch of the Government in 1892 opening up the reservation definitely used the word "within" and in 1903 the Federal Government assumed jurisdiction of all reservations and in 1949 the Federal Government still felt by their pronounced statutes that all of the territory was Indian country.

Kills Plenty v. United States, 133 F.2d 292, Certiorari denied 1943, 63 S.Ct. 1172, makes a good discussion of these Federal statutes in the State of South Dakota, not from the theory of intention as we have used them in this brief at least partially, but also from the theory that this was a complete relinquishment and it really was an agreement between the State of South Dakota and the United States of America that the United States of America had exclusive jurisdiction upon this Rosebud Reservation that they were speaking of, but their reasoning as set forth in this would apply to the Sisseton-Wahpeton Reservation as well when Judge Sanborn stated:

> "It is contended by the appellants that the words 'within the limits of any Indian reservation' should be construed as though they read, 'within the limits of any Indian reservation upon lands therein the Indian title to which has not been extinguished.' We think that Congress did not intend that any such limitation should be read into this statute. The statute, in effect, represents a compact between the State of South Dakota and the United States whereby the United States agreed to prosecute in the United States District Court for the District of South Dakota persons charged with certain major crimes committed within the boundaries of the Indian reservations in that State."

This comes back and we find the same type of argument in the Seymour case supra where the State was trying to write in when it stated under No. 1151 "notwithstanding the issuance of any patent" to mean only the issuance of a patent to an Indian, and again as our United States Supreme Court so ably stated that they cannot find any adequate justification for such an interpretation, and if this cannot be found then all of the

country within the exterior boundaries of this reservation would be Indian Country as per 1151.

A map of this reservation is found under Appendix No. 8, and from this it can be seen that there is a checkerboard, or crazy-quilt if you will, pattern in this reservation the same as was expressed in the Seymour supra case, and that we follow the ruling as was expressed in Seymour:

> "Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of #1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid."

Another of our more recent cases is *City of New Town, North Dakota v. United States*, 454 F.2d 121 (1972), which is an action for a summary judgment to try and establish some of these conflicting ideas that have generated over the years, and again they followed Seymour supra, and also that opening up for homestead and townsites certain parts of the reservation is not inconsistent with the keeping of the reservation and that it does not diminish a reservation.

Mattz v. Arnett, 412 U.S. 481 (1973) does not deal directly with the criminal side; however, there is a great deal of the criminal part that is taken into consideration in the decision of this case which is another one in the same line with Seymour supra and has the same general set of facts as far as a reservation is concerned. However, some of it was done with Executive Order rather than by Congressional Enactment such as on the case at hand which does not make it as strong.

With the unallocated lands being made available to

non-Indians with the purpose in particular of promoting interaction of the races and encouraging Indians to adopt white ways and the Court here recognized the analogous setting of Seymour supra, so when the petitioner was seeking to have his fish nets returned to him, this being a civil action, the same rules were applied as were applied in Seymour and as we feel the Court should apply in this case, and was applied by the lower Court, excluding the State jurisdiction.

The first of these Indian cases that came down is in *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 and in 1832 wherein the policy as regarding our Government and the Indians was first acknowledged, and it was held by Justice Marshall that the Indian nations were:

> "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guaranteed by the United States."

It follows from this concept of the Indian Reservations as separate and independent, that State law could have no role within the Reservation boundaries, and that there is a distinct community within which the State laws have no force, and as Justice Marshall stated:

> "The intercourse between the United States and this nation is, by our constitution and laws, vested in the United States of America." *Ex parte Crow Dog*, 109 U.S. 556 (1883), *United States v. Kagama*, 118 U.S. 375 (1886)

The last of our Indian cases that has come up before our United States Supreme Court is *McClanahan v. State Tax Commissioner*, 41 LW 4457, which gives us a lot of

the reasoning back of all of this and citing *Williams v. Lee*, 358 U.S. 217, a 1959 case where it states:

> "Over the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the right of Indians would not be jeopardized . . . Thus, suits by Indians against outsiders in state courts have been sanctioned . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . But *if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive* . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them." (Emphasis added)

In the McClanahan case supra, it is interesting to note that when Arizona entered the Union that they had a similar agreement on these Indian lands as did South Dakota and was cited heretofore.

There have been a number of other cases as well, but it boils down to a part of whether the State of South Dakota is going to be an island on itself and decide these issues differently from our Federal Courts decided them, and where the rights of Indians are involved it seems to be admitted by all that the Federal Government does have the right to make this determination and unless there is some express relinquishment of this right by Congress as is set out in Celestine supra, the State governments must take a hands-off attitude even where they have tried to infringe upon these Federal rights without having any Federal right part as we have found in our state where the State Legislature has changed the

laws and attempted to change the agreement with the Federal Government but without Congressional approval or consent or even knowledge, for it does not appear that Congress has even been asked to have concurrent jurisdiction.

We have in the last years had two attempts at giving Federal Court jurisdiction in the early 50's and the early 60's which were turned down by the State of South Dakota completely and entirely which also goes back to the intention that the people of South Dakota do not want to assume this jurisdiction.

Unless we have an island of the State of South Dakota but it is on Federal decisions, and the Circuit Court of Appeals has not seen fit to follow these decisions, we will have to have one decision that governs the whole part not only the Eighth Circuit Court decisions that have been following the United States Supreme Court but also our State decisions, which go both ways.

Judge Blackmun in his decision in *Beardslee v. United States of America*, 387 F.2d 280, brought this out when he stated:

> "Other courts almost uniformly have upheld Federal jurisdiction or denied state jurisdiction, where the offense was committed by an Indian within the boundaries of a reservation but on particular land not owned by an Indian. Disestablishment thus is not effected by an allotment to an Indian or by conveyance of the Indian title to a non-Indian."

This is the only way that this situation can be handled and handled efficiently and properly as otherwise we will run on to the situation that our United States Courts so ably commented about and held in the Seymour case supra, that we would have an almost impossible situation,

and it is interesting to note in this regard that Judge Lay of the Circuit Court of Appeals in *Miner v. Erickson*, 428 F.2d 623, in his minority opinion said that the officers "guessed" wrong and that is what we are going to be up against continually and all the way through here unless we will follow and affirm the decision that is now before this Court.

Long before the Seymour case, the State of Montana in *Irvine v. District Court of Fourth Judicial District* before the Supreme Court for the State of Montana, 239 P.2d 272, had this very same question before it, and the exhaustive history and discussion of this whole Indian question, we think, is remarkable and perhaps goes a little bit on the theory of guardian and ward and wards of the nation than the Seymour case does, but nevertheless following the same theory when it stated:

> "The fact that the Federal Government has alienated its fee in land or lands, by patent, which are situate within the limits of a regularly organized Indian reservation in the state does not divest it of its exclusive jurisdiction over its ward Indian, who has committed, within the limits of such an Indian reservation, one of the ten major crimes, and such Indian committing such a crime is accountable only to it for the offense." *Ex parte Pero and Moore*, 99 F.2d 28. Certiorari denied, *Lee v. Pero*, 59 S.Ct. 581

This issue also came up a few years later in *Bokas v. District Court of Fifteenth Judicial District*, 270 P.2d 396, and was affirmed by the Supreme Court of Montana again, and thereafter in *Guith v. United States of America*, 230 F.2d 481, the Circuit Court of Appeals for the Ninth Circuit, which was another Montana case, adopted this same theory.

CONCLUSIONS

After going through the earlier cases as the one handed down by Chief Justice Marshall in Worcester supra to the most recent cases of this Supreme Court that we are now before, in McClanahan supra, the pattern is definitely established that crimes committed by an Indian within the confines of the Indian Reservation are subject only to the laws of the United States of America, whether we adopt the strict legal part that the Federal Government has control over these lands, or we adopt the ward theory that the Indians are wards of the Federal Government, or whether we go by a hybrid or in between theory and adoption, some of both, which your writer prefers, and in addition thereto Congress with the laws that have been on the books continually not only the case law that they have not repudiated but the intention of the Congress as it has written these laws, taking into consideration the decisions from the case law, have certainly indicated their intention of continuing the Federal jurisdiction over the Indians who stay on the reservations, and that the opening up of the territory to white settlement was just an attempt as this Court stated in Mattz supra:

> "of promoting interaction between the races and encouraging Indians to adopt white ways"

and as is also stated by this Court in Mattz supra, on Page 22:

> "Congress was fully aware of the means by which

termination could be effected"

and there has been no definite terminating of the Federal control.

Respectfully submitted,

L. R. GUSTAFSON
Britton, South Dakota 57430
Attorney for Respondents

APPENDIX 1

TREATY OF FEBRUARY 19, 1867, 15 STAT. 505

Whereas it is understood that a portion of the Sissiton and Warpeton bands of Santee Sioux Indians, numbering from twelve hundred to fifteen hundred persons, not only preserved their obligations to the Government of the United States, during and since the outbreak of the Medewakantons and other bands of Sioux in 1862, but freely perilled their lives during that outbreak to rescue the residents on the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands; and that another portion of said Sissiton and Warpeton bands, numbering from one thousand to twelve hundred persons, who did not participate in the massacre of the whites in 1862, fearing the indiscriminate vengeance of the whites, fled to the great prairies of the Northwest, where they still remain: and

Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sissiton and Warpeton bands, and it is believed that they have been suffered to remain homeless wanderers, frequently subject to intense sufferings from want of subsistence and clothing to protect them from the rigors of a high northern latitude, although at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites; and

Whereas the several subdivisions of the friendly Sissitons and Warpeton bands ask, through their repre-

sentatives, that their adherence to their former obligations of friendship to the Government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence: Therefore,

A treaty has been made and entered into, at Washington City, District of Columbia, this nineteenth day of February, A.D. 1867, by and between Lewis V. Bogy, Commissioner of Indian Affairs, and William H. Watson, commissioners, on the part of the United States, and the undersigned chiefs and head-men of the Sissiton and Warpeton bands of Dakota or Sioux Indians, as follows, to wit:

Article 1. The Sissiton and Warpeton bands of Dakota Sioux Indians, represented in council, will continue their friendly relations with the Government and people of the United States, and bind themselves individually and collectively to use their influence to the extent of their ability to prevent other bands of Dakota or other adjacent tribes from making hostile demonstrations against the Government or people of the United States.

Article 2. The said bands hereby cede to the United States the right to construct wagon-roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the Government may require, over and across the lands claimed by said bands, (including their reservation as hereinafter designated) over any route or routes that may be selected by the authority of the Government, said lands so claimed being bounded on the south and east by the treaty-line of 1851, and the Red River of the North to the mouth of

Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly point of Devil's Lake to the Chief's Bluff at the head of James River, and on the west by the James River to the mouth of Mocasin River, and thence to Kampeska Lake.

Article 3. For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government, and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent revision, viz:

Beginning at the head of Lake Travers[e], and thence along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

Article 4. It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut-Head bands of Yanktonais Sioux, a reservation bounded as follows, viz:

Beginning at the most easterly point of Devil's Lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest

point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

Article 5. The said reservations shall be apportioned in tracts of (160) one hundred and sixty acres to each head of a family or single person over the age of (21) twenty-one years, belonging to said bands and entitled to locate thereon, who may desire to locate permanently and cultivate the soil as a means of subsistence: each (160) one hundred and sixty acres so allotted to be made to conform to the legal subdivisions of the Government surveys when such surveys shall have been made; and every person to whom lands may be allotted under the provisions of this article, who shall occupy and cultivate a portion thereof for five consecutive years shall thereafter be entitled to receive a patent for the same so soon as he shall have fity acres of said tract fenced, ploughed, and in crop: Provided, That said patent shall not authorize any transfer of said lands, or portions thereof, except to the United States, but said lands and the improvements thereon shall descend to the proper heirs of the persons obtaining a patent.

Article 6. And, further, in consideration of the destitution of said bands of Sissiton and Warpeton Sioux, parties hereto, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life under the system in operation on the Sioux reservation in 1862; including, if thought advisable, the establishment and support of local and manual-labor schools; the employment of

agricultural, mechanical, and other teachers; the opening and improvement of individual farms; and generally such objects as Congress in its wisdom shall deem necessary to promote the agricultural improvement and civilization of said bands.

Article 7. An agent shall be appointed for said bands, who shall be located at Lake Traverse; and whenever there shall be five hundred (500) persons of said bands permanently located upon the Devil's Lake reservation there shall be an agent or other competent person appointed to superintend at that place the agricultural, educational, and mechanical interests of said bands.

Article 8. All expenditures under the provisions of this treaty shall be made for the agricultural improvement and civilization of the members of said bands authorized to locate upon the respective reservations, as hereinbefore specified, in such manner as may be directed by law; but no goods, provisions, groceries, or other articles-except materials for the erection of houses and articles to facilitate the operations of agriculture-shall be issued to Indians or mixed-bloods on either reservation unless it be in payment for labor performed or for produce delivered: Provided, That when persons located on either reservation by reason of age, sickness, or deformity, are unable to labor, the agent may issue clothing and subsistence to such persons from such supplies as may be provided for said bands.

Article 9. The withdrawal of the Indians from all dependence upon the chase as a means of subsistence being necessary to the adoption of civilized habits among them, it is desirable that no encouragement be afforded them to continue their hunting operations as means of

support, and, therefore, it is agreed that no person will be authorized to trade for furs or peltries within the limits of the land claimed by said bands, as specified in the second article of this treaty, it being contemplated that the Indians will rely solely upon agricultural and mechanical labor for subsistence, and that the agent will supply the Indians and mixed-bloods on the respective reservations with clothing, provisions, &c., as set forth in article eight, so soon as the same shall be provided for that purpose. And it is further agreed that no person not a member of said bands, parties hereto whether white, mixed-blood, or Indian, except persons in the employ of the Government or located under its authority, shall be permitted to locate upon said lands, either for hunting, trapping, or agricultural purposes.

Article 10. The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or law adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

In testimony whereof, we, the commissioners representing the United States, and the delegates representing the Sissiton and Warpeton bands of Sioux Indians, have

hereunto set our hands and seals, at the place and on the day and year above written.

LEWIS V. BOGY,
Commissioner of Indian Affairs.
W. H. WATSON.

APPENDIX 2

Act of March 3, 1891, 26 Stat. 1035.

SEC. 26. That the following agreement entered into on behalf of the United States by Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, commissioners on the part of the United States, on the twelfth day of December, eighteen hundred and eighty-nine, with the Sisseton and Wahpeton bands of Dakota or Sioux Indians now on file in the Department of the Interior, signed by said commissioners for the United States, and for said Indians by Simon Ananangmari and others, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

"Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it

shall be fore the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress: and the form and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency South Dakota, on this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men, and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

ARTICLE I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof, as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for

other purposes:" Provided, That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: Provided further, That the cession sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand four hundred dollars, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement.

ARTICLE III.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived

by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

ARTICLE IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee and Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ELIPHALET WHITTLESEY,
D. W. DIGGS,
CHAS. A. MAXWELL,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us, in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

SEC. 27. That for the purpose of carrying out the terms and provisions of said agreement there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated the sum of two million two hundred and three thousand dollars, of which amount the sum of five hundred and three thousand two hundred dollars shall be immediately available, and the same, or so much thereof as may be necessary, shall be paid as follows, to wit: To the Sisseton and Wahpeton Indians, parties to this agreement, the sum of three hundred and seventy-six thousand five hundred and seventy-eight dollars and thirty-seven cents, said amount to be distributed per capita. To the scouts and soldiers of

the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of eighteen hundred and sixty-two:" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such scouts and soldiers as are dead, who are not included in the foregoing class, as parties to said agreement, the sum of one hundred and twenty-six thousand six hundred and twenty dollars, said amount to be distributed per capita; and the said sum of five hundred and three thousand and two hundred dollars or so much thereof as may be necessary, when paid to the said Sisseton, Wahpeton, Medowakanton, and Wahpakoota bands of Sioux Indians, their families and descendants, designated in this act, shall be deemed a full settlement of all claims they may have for unpaid annuities, under any and all treaties or Acts of Congress up to the thirtieth day of June, eighteen hundred and ninety; Provided however, That all contracts or agreements between said Indians or any of them, and agents, attorneys, or other persons for the payment of any part of this appropriation for or on account of fees or compensation to said agents, attorneys or other persons, unless the same have been made, as provided by law, and are yet in force and have been approved by the Department of the Interior, or have been made by and between citizens of the United States are hereby declared null and void, and in such cases the Secretary of the Interior shall cause all moneys herein appropriated to be paid directly to the said Indians and shall pay no portion

of the same, to their said agents or attorneys. And in no event shall a sum exceeding ten per cent be paid to any agent or attorney, and the balance, after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fifty cents per acre, shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

SEC. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished, and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

SEC. 29. That in order to further carry out the provisions of said agreement and of this act, the Secretary of the Interior is authorized and directed, as soon as practicable, to cause the additional allotment provided for in said agreement to be made in the manner and form as provided in an act entitled "An act to provide for the allotments of lands in severalty to Indians on the various

reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," and as provided in any existing amendments of said act, approved February eighth, eighteen hundred and eighty-seven, and to pay the sums hereinbefore made immediately available, first to the parties to said agreement, or their proper representatives, and to appoint suitable officers for such purposes who shall furnish bonds usual in such cases, and whose compensation and expenses shall be paid out of said available funds as the Secretary of the Interior shall direct, and whose lawful acts, when approved by him, shall be final and conclusive.

SEC. 30 That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located; Provided, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

APPENDIX 3

USCA 18 # 1151

#1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, #25, 63 Stat. 94.

Historical and Revision Notes

Reviser's Note. Based on sections 548 and 549 of Title 18 and sections 212, 213, 215, 217, 218 of Title 25, Indians, U.S. Code, 1940 ed. (R.S. ## 2142, 2143, 2144, 2145, 2146; Feb. 18, 1875, c. 80, #1, 18 Stat. 318; Mar. 4, 1909, c. 321, ## 328, 329, 35 Stat. 1151 [derived from Mar. 3, 1885, c. 341, # 9, 23 Stat. 385; Jan. 15, 1897, c. 29, # 5, 29 Stat. 487; Feb. 2, 1903, c. 351, 32 Stat. 793]; Mar. 3, 1911, c. 231, # 291, 36 Stat. 1167; June 28, 1932, C. 284, 47 Stat. 337).

This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law.

R.S. ## 2145, 2146 (U.S.C., Title 25, ## 217, 218) extended to the Indian country with notable exceptions the criminal laws of the United States applicable to places within the exclusive jurisdiction of the United States. Crimes of Indians against Indians, and crimes punishable by tribal law were excluded.

The confusion was not lessened by the cases of U.S. v. McBratney, 104 U.S. 622 and Draper v. U.S., 17 S.Ct. 107, holding that crimes in Indian country by persons not Indians are not cognizable by Federal courts in absence of reservation or cession of exclusive jurisdiction applicable to places within the exclusive jurisdiction of the United States. Because of numerous statutes applicable only to Indians and prescribing punishment for crimes committed by Indians against Indians, "Indian country" was defined but once. (See act June 30, 1834, c. 161, # 1, 4 Stat. 729, which was later repealed.)

Definition is based on latest construction of the term by the United States Supreme Court in U.S. v. McGowan, 58 S.Ct. 286, 302 U.S. 535, following U.S. v. Sandoval, 34 S.Ct. 1, 5, 231 U.S. 28, 46. (See also Donnelly v. U.S., 33 S.Ct. 449, 228 U.S. 243; and Kills Plenty v. U.S., 133 F.2d 292, certiorari denied, 1943, 63 S.Ct. 1172. (See reviser's note under section 1153 of this title.)

Indian allotments were included in the definition on authority of the case of U.S. v. Pelican 1913, 34 S.Ct. 396, 232 U.S. 442, 58 L.Ed. 676. 80th Congress House Report No. 304.

1949 Amendment. Act May 24, 1949 incorporated the

limitations of the term "Indian country" which are contained in sections 1154 and 1156 of this title.

Legislative History: For legislative history and purpose of Act May 24, 1949, see 1949 U.S. Code Cong. Service, p. 1248.

APPENDIX 4

SOUTH DAKOTA CONSTITUTION

ARTICLE XXII

COMPACT WITH THE UNITED STATES

CROSS-REFERENCES

Freedom of religion, Const., art. VI, # 3.
Indian country, jurisdiction, ## 1-1-12. to 1-1-21.
Public school system, Const., art. VIII; Title 13.

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of

South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools,

which shall be open to all the children of this state, and free from sectarian control.

APPENDIX 5

HISTORY

1901 Session Laws, Chp. (H. B.) 106, Page 176

"CEDING JURISDICTION TO UNITED STATES OVER OFFENSES COMMITTED UPON INDIAN RESERVATIONS.

An Act Ceding to the United States of America Jurisdiction over Criminal Offenses Committed upon Indian Reservations Within the State of South Dakota.

Be it Enacted by the Legislature of the State of South Dakota:

Sec. 1. JURISDICTION GIVEN TO THE UNITED STATES.) There is hereby relinquished and given to the United States of America and the officers and courts thereof exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons whomsoever who shall, upon any Indian reservation within the State of South Dakota, commit any act in violation of the penal laws of the United States.

Sec. 2. COSTS NOT CHARGEABLE TO SOUTH DAKOTA.) No costs or charges incurred in the courts of

the United States in the prosecution of offenses committed upon any Indian reservation shall be chargeable to the State of South Dakota.

Sec. 3. TO TAKE EFFECT WHEN.) This act shall be in full force and effect, whenever the jurisdiction hereby relinquished shall be assumed by the United States.

Sec. 4. All acts and parts of acts in conflict with the provisions of this Act are hereby repealed."

Approved Feb. 14, 1901.

This appears in the 1903 Revised Code of South Dakota No. 8, Page 3, as follows:

"#8. There shall be given and relinquished to the United States and the officers and courts thereof exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons whomsoever who shall, upon any Indian reservation within the State of South Dakota, commit any act in violation of the penal laws of the United States, and no costs or charges incurred in the Courts of the United States in the prosecution of offenses committed upon any Indian Reservation shall be chargeable to the State of South Dakota. Provided, this section shall be in full force and effect whenever the jurisdiction hereby relinquished shall be assumed by the United States."

This becomes #5053, in our 1919 Code as follows:

"#5053. INDIAN RESERVATIONS. Exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons who shall commit any act in violation of the penal laws of the United States, upon any Indian Reservation within this state, shall be given and relinquished to the United States and the officers and Courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States Courts, in the prosecution of offences commited upon any Indian Reservation, shall be chargeable to this state."

This was amended by Chapter 158, of the 1929 Session Laws, as follows:

"RELATING TO CRIMINAL JURISDICTION UPON

AN ACT Entitled, An Act to amend Section 5053 of the Revised 1919 Code of the State of South Dakota, Relative to Criminal Jurisdiction of the United States of America and the State of South Dakota upon Indian Reservations.

Be it Enacted by the Legislature of the State of South Dakota:

Section 1. That Section 5053 of the Revised 1919 Code of the State of South Dakota, relative to criminal jurisdiction of the United States of America and the State of South Dakota upon Indian Reservations be amended to read as follows:

Section 5053. INDIAN RESERVATIONS. Exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons who shall commit any act in violation of the penal laws of the United States, upon any Indian Reservation within this state, shall be given and relinquished to the United States and the officers and courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States courts, in the prosecution of offences committed upon any Indian Reservation, shall be chargeable to this state, but whenever any of said acts committed by any person upon any Indian Reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the state of South Dakota, to arrest, prosecute, convict and punish any person committing any offense under the laws of the State of South Dakota, even though the acts constituting such offense may also constitute an offense under the laws of the United States of America.

Approved March 14, 1929."

This later became 34.0502 in the 1939 Code with changes, but Judge Wyman dis-regarded this part of the change, assumed jurisdiction as in the 1939 Code on concurrent jurisdiction, in the Kills Plenty Case:

"34.0502 INDIAN RESERVATIONS: JURISDICTION OF PERSONS COMMITTING CRIME: EXCLUSIVE FEDERAL. Exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons

who shall commit any act in violation of the penal laws of the United States upon any Indian reservation within this state shall be given and relinquished to the United States and the officers and courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States Courts, in the prosecution of offenses committed upon any Indian reservation shall be chargeable to this state, but whenever any of said acts committed by any person upon any Indian Reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the State of South Dakota to arrest, prosecute, convict and punish any person committing any offense under the laws of the state of South Dakota even though the acts constituting such offense may also constitute an offense under the laws of the United States of America.

Whenever the United States has assumed jurisdiction to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian Reservation within this state, as a result of this cession of such jurisdiction by the state of South Dakota, and shall later relinquish such assumed jurisdiction, such jurisdiction shall revert to the State of South Dakota, and this section shall operate to accept the relinquishment by the United States of jurisdiction over persons other than Indians for the commission of crimes upon Indian reservations contained in 18 United States Code Annotated, section 1153, and to reinvest such jurisdiction in the state of South Dakota.

In the absence of treaty or statute of the United

States, the state of South Dakota shall have jurisdiction to arrest, prosecute, convict, and punish any person committing any offense under the laws of the State of South Dakota, on any Indian reservation or in the Indian Country."

In 1951, by Chapter 187; which went into 34.0502:

"Section 1. That SDC 34.0502 be, and the same is hereby Amended to read as follows:

34.0502 Exclusive jurisdiction and authority to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian Reservation within this state shall be given and relinquished to the United States and the officers and courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States Courts, in the prosecution of offenses committed upon any Indian Reservation shall be chargeable to this state, but whenever any of said acts committed by any person upon any Indian Reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the State of South Dakota to arrest, prosecute, convict, and punish any person committing any offense under the laws of the state of South Dakota even though the acts constituting such offense may also constitute an offense under the laws of the United States of America.

Whenever the United States has assumed jurisdiction to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian Reservation within this state, as a result of this cession of such jurisdiction by the state of South Dakota, and shall later relinquish such assumed jurisdiction, such jurisdiction shall revert to the state of South Dakota, and this act shall operate to accept the relinquishment by the United States of jurisdiction over persons other than Indians for the commission of crimes upon Indian Reservations contained in 18 United States Code Annotated, Section 1153, and to reinvest such jurisdiction in the state of South Dakota.

In the Absence of treaty or statute of the United States, the state of South Dakota shall have jurisdiction to arrest, prosecute, convict, and punish any person committing any offense under the laws of the state of South Dakota, on any Indian Reservation or in the Indian country."

Part of this section 34.0502, is now 23-9-4, and this is the same as in the 1901 Session Laws.

"23-9-4. Exclusive jurisdiction over federal crimes on Indian reservation–Relinquishment by South Dakota.– Exclusive jurisdiction and authority to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian reservation within this state shall be given and relinquished to the United States and the officers and

courts thereof, whenever such jurisdiction shall be assumed by the United States."

"23-9-9. State jurisdiction of state crimes in Indian country.—In the absence of treaty or statute of the United States, the state of South Dakota shall have jurisdiction to arrest, prosecute, convict, and punish any person committing any offense under the laws of the state of South Dakota on any Indian reservation or in the Indian country.

APPENDIX 6

USCA 18 # 3242

#3242. Indians committing certain offenses; acts on reservations

All Indians committing any of the following offenses; namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States. June 25, 1948, c. 645, 62 Stat. 827; May 24, 1949, c. 139, # 51, 63 Stat. 96; Nov. 2, 1966, Pub.L. 89-707, # 2, 80 Stat. 1101.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., # 548 (Mar. 4, 1909, c. 321, # 328, 35 Stat. 1151; June 28, 1932, c. 284, 47 Stat. 337 [Derived from Acts March 3, 1885, c. 341, # 9, 23 Stat. 385; Jan. 15, 1897, c. 29, # 5, 29 Stat. 487]).

The provisions defining rape in accordance with the law of the State and prescribing imprisonment at the discretion of the court for rape by an Indian upon an Indian are now included in section 1153 of this title. (See also section 6 of this title.)

Section 549 of said Title 18, relating to crimes in Indian reservations in South Dakota, was omitted as covered by section 1153 of this title. Accordingly the last sentence of said section 548, extending this section to prosecutions of Indians in South Dakota, was also omitted as unnecessary because this section is sufficient and applicable. Other provisions of said section 548 are incorporated in sections 1151 and 1153 of this title.

Minor changes were made in phraseology. 80th Congress House Report No. 304.

1966 Amendment. Pub.L. 89-707 added carnal knowledge and assault with intent to commit rape as offenses cognizable within the exclusive jurisdiction of the United States when committed on and within the Indian country.

1949 Amendment. Act May 24, 1949, substituted "within the Indian country" for "within any Indian reservation, including rights-of-way running through the reservation,".

Legislative History. For legislative history and purpose of Act May 24, 1949, see 1949 U.S. Code Cong. Service, p. 1248. See, also, Pub.L. 89-707, 1966 U.S. Code Cong. and Adm. News, p. 3653.

APPENDIX 7

April 11, 1892; Stat. 1017

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA: A PROCLAMATION.

Whereas, by the third article of the treaty between the United States of America and the Sisseton and Wahpeton bands of Dakota or Sioux Indians, concluded February 19, 1867, proclaimed May 2, 1867 (15 U.S. Statutes, p. 505, the United States set apart and reserved for certain of said Indians certain lands, particularly described, being situated partly in North Dakota and partly in South Dakota, and known as the Lake Traverse Reservation; and

Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made, which are provided for in article four of the agreement, as follows: "that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands

heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual"; and

Whereas, it is provided in article two of said agreement, "That the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of $342,778.37, together with the sum of $18,400, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement"; and

Whereas, it is provided in the act of Congress approved March 3, 1891 (26 U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians:

"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located: Provided, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly

paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same," and

Whereas, Payment as required by said act, has been made by the United States; and

Whereas, Allotments as provided for in said agreement, as now appears by the records of the Department of the Interior will ha e been made, approved, and completed, and all other terms and considerations required will have been complied with on the day and hour hereinafter fixed for opening said lands to settlement.

Now, therefore, I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians, and the lands reserved for other purposes in pursuance of the provisions of said agreement and the said act of Congress ratifying the same and other, the laws relating thereto will, at and after the hour of twelve o'clock noon (central standard time) on the fifteenth day of April, A.D. eighteen hundred and ninety-two, and not before, be opened to settlement under the terms of and subject to all the terms and conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, and the laws of the United States applicable thereto.

The lands to be opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Lake Traverse Reservation opened to settlement by proclamation of the President dated April 11, 1892," and which schedule is made a part hereof.

Warning, moreover, is hereby given that until said lands are opened to settlement as herein provided, all persons, save said Indians, are forbidden to enter upon and occupy the same or any part thereof.

And further notice is hereby given that it has been duly ordered that the lands mentioned and included in this Proclamation shall be, and the same are attached to the Fargo and Watertown land districts, in said States, as follows:

1. All that portion of the Lake Traverse Reservation, commencing at the northwest corner of said reservation; thence south 12 degrees 2 minutes west, following the west boundary of the reservation to the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence east, following the new seventh standard parallel to its intersection with the north boundary of said Indian reservation; thence northwesterly with said boundary to the place of beginning, is attached to the Fargo land district, the office of which is now located at Fargo, North Dakota.

2. All that portion of the Lake Traverse Reservation, commencing at a point where the new seventh standard parallel intersects the west boundary of said reservation; thence southerly along the west boundary of said reservation to its extreme southern limit; thence northerly along the east boundary of said reservation to Lake Traverse; thence north with said lake to the northeast corner of the Lake Traverse Indian Reservation; thence westerly with the north boundary of said reservation to its intersection with the new seventh standard

parallel, or boundary line between the States of North and South Dakota; thence with the new seventh standard parallel to the place of beginning, is attached to the Watertown land district, the office of which is now located at Watertown, South Dakota.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of our Lord one thousand eight hundred and ninety-two, and of the independence of the United States the one hundred and sixteenth.

BENJ. HARRISON

By the President:
JAMES G. BLAINE
Secretary of State.

APPENDIX 8

4/7/1992
Ex #1
James Gravelle

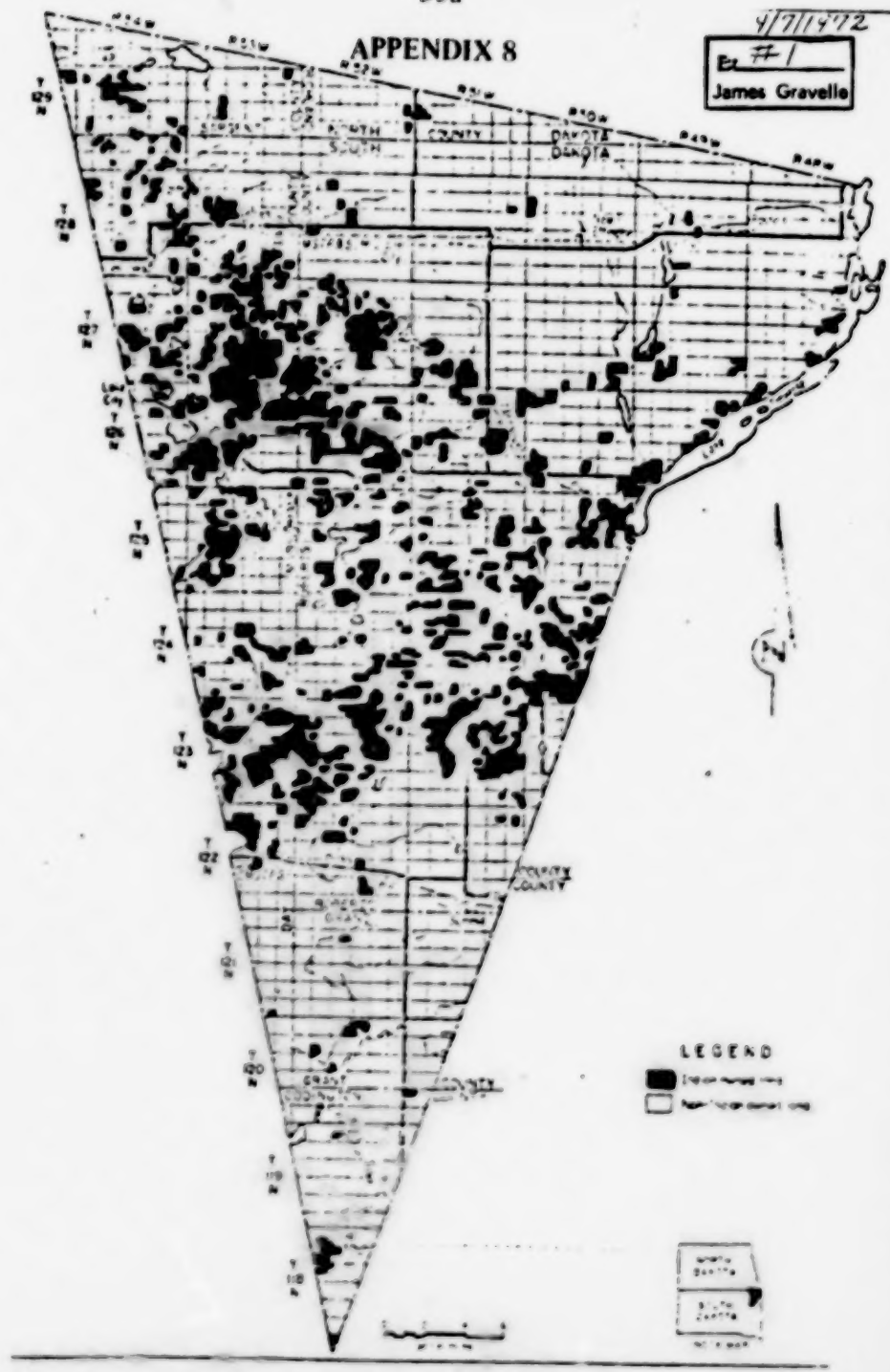

FIGURE 1. – Land Status, S[illegible]sseton[illegible]apeton Reservation, South Dakota. (Adapted from Bureau of Indian Affairs land status map.)